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Two Sides of the Same Coin

Hazardous Waste Siting on Indian Reservations and In Minority Communities

By Jeffrey R. Cluett²

I. Introduction

"We are recruiting all of the garbage, the scum that nobody else wants."¹

In the last fifteen years, the environmental community has become increasingly aware of the effects of environmental racism upon the siting of hazardous waste treatment and storage facilities. Little of the literature on environmental racism however, has recognized that different minority communities are affected in disparate ways by this phenomenon. Part II of this Note begins with a general discussion of the issue of environmental racism and an analysis of the literature that debates its existence. Part III looks at how the federal government empowers Indian tribes to play a greater role in regulating hazardous waste projects. Although it is beyond the scope of the Note to statistically analyze the disparate effects among different minorities, this Note focuses on how environmental racism affects American Indians differently than other minority groups. Part IV discusses a minority community's inability to have its environmental needs addressed. In Part V, the author proposes a means by which minorities, and citizens generally, can have a greater say over the siting of hazardous waste facilities in their community.

II. The Recognition of Environmental Racism

Reverend Benjamin Chavis, Executive Director of the United Church of Christ Commission for Racial Justice, coined the term "environmental racism" in response to a 1982 decision to site a polychlorinated biphenyl (PCB) landfill in the community of Afton, Warren County, North Carolina.² Afton is 84 percent

² J.D., 1998, University of California, Hastings College of the Law.

¹ Dan Hardy & Anthony R. Wood, *In the City of Chester, Treatment Questioned—City Council Says Waste is a Business They Can Live. Residents Say They're Being Dumped On* PHILA. INQUIRER, Sept. 5, 1993, at A1 [hereinafter Hardy & Wood, *Treatment Questioned*].

² See ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* 35 (1991). Chavis notes that today, minorities are "fighting back. Even in the worst situations, glimmers of hope emerge, because people are uniting—uniting across racial lines and socio-economic lines—and the common demand is for environmental justice." Marianne Lavelle and Marcia Coyle, *Unequal Protection, the Racial Divide in Environmental Law, a Special Investigation*, NAT'L L.J., Sept. 21, 1992, at S2 [hereinafter Lavelle & Coyle, *Special Investigation*].

African-American, while African-Americans constitute 63.7 percent of the county population and 24.2 percent of the state population.³ The siting decision sparked a church-led protest by African-American residents, resulting in 500 arrests.⁴ The protest generated national support and greater awareness of the effect of hazardous waste siting on minority communities.⁵

The movement sparked a number of studies, including the United Church of Christ Commission for Racial Justice's 1987 study, "Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-economic Characteristics of Communities with Hazardous Waste Sites" (Church of Christ Study), and the General Accounting Office of Congress' 1983 study, "Siting of Hazardous Waste Landfills and Their Correlation with the Racial and Economic Status of Surrounding Communities" (GAO Study).⁶ The Church of Christ Study is considered one of the most important analyses of environmental racism.⁷ Consequently, activists increasingly use the Church of Christ Study, along with a growing body of other scientific research, to show that minorities bear a disproportionate amount of the country's worst pollution.⁸

The Church of Christ Study used residen-

tial zip codes to define "communities" and United States Census Bureau statistics to measure "race."⁹ While the Commission of Racial Justice realized that variations in a given geographic area limits the usefulness of a study based on zip codes, it believed that zip codes were still the best units of analysis.¹⁰

The study made several important findings. Race proved to be the most important variable associated with the siting of hazardous waste facilities nationwide.¹¹ The study also found that the mean value of homes was a significant factor in the presence of hazardous waste sites.¹² The study noted, however, that the availability of cheaper land always influences hazardous waste siting.¹³ The fact that minorities are often present in these areas suggests the interplay of environmental and other institutionalized racism.¹⁴ In communities with one commercial waste facility, the minority percentage of the population was twice the national average.¹⁵ In those communities with more than one facility, the minority percentage was three times the national average.¹⁶ In addition, three of the five largest landfills in the country, comprising 40 percent of the nation's total estimated landfill capacity, were located in mostly Hispanic or African-American communities.¹⁷

3. See BULLARD, *supra* note 2, at 36.

4. See Lavelle & Coyle, *Special Investigation*, *supra* note 2, at S2.

5. See COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES 2-3 (1987) [hereinafter CHURCH OF CHRIST STUDY].

6. *Id.* at 3.

7. See Daniel C. Wigley and Kristen S. Shrader-Frechette, *Environmental Racism and Biased Methods of Risk Assessment*, 7 RISK: HEALTH SAFETY & ENV'T 55, 55 (1996). See generally Vicki Been, *Analyzing Evidence of Environmental Justice*, 11 J. LAND USE & ENVT'L. L. (1995).

8. See Lavelle & Coyle, *Special Investigation*, *supra* note 2, at S2.

9. CHURCH OF CHRIST STUDY, *supra* note 5, at 9.

10. See *id.* at 62.

11. See *id.* at 15.

12. See *id.* at 16.

13. See *id.*

14. See *id.* at 13, 16.

15. See *id.* at xiii. The term "minorities" includes African Americans, Hispanic Americans, Asian Americans, Pacific Islanders and Native Americans. See *id.* at ix.

16. See *id.* at xiii.

17. See *id.* at xiv. The zip codes with the five largest landfills and their respective percentages of minority populations are the following: 1) Calumet City, Cook County, Illinois, 10.6 percent; 2) Mamou, Evangeline County, Louisiana, 23.8 percent; 3) Emelle, Sumter County, Alabama, 79.5 percent; 4) Kettleman City, Kings County, California, 79.8 percent; and 5) Scotlandville, East Baton Rouge County, Louisiana, 94.7 percent. See *id.* at 47 tbl b-8. Similarly, the General Accounting Office of Congress' 1983 study found that in the eight states in EPA region IV (Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee), GENERAL ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES ii (1983) [hereinafter GAO STUDY], four offsite hazardous waste facilities were located in communities that were between 38 percent and 90 percent African American, see CHURCH OF CHRIST STUDY, *supra*

Studies by the Social and Demographic Research Institute at the University of Massachusetts (SADRI), however, challenged the studies' findings.¹⁸ Using 1990 census data, SADRI found no statistically significant differences between the percentages of African-Americans in host and non-host census tracts.¹⁹ SADRI did find a significant difference in the percentage of families living below the poverty line.²⁰ SADRI claimed that there are "no consistent and statistically significant differences in the racial or ethnic composition of tracts that contain commercial [treatment, storage and disposal of hazardous waste facilities] and those that do not."²¹ One reason for the differences may have been the geographical units used. SADRI used census tracts in which locally undesirable land uses (LULUs) were located,²² rather than using zip codes as the Church of Christ study had done.²³

The SADRI studies have been extremely criticized. In fact, SADRI is almost alone in suggesting that environmental racism is not a serious problem.²⁴ One critic, Professor Vicki Been, also using census tracts, obtained different results.²⁵ While median income and the level of education obtained were markedly lower in communities with a hazardous waste facility, the percentage of racial minorities within a community also indicated the likelihood of the existence of a hazardous waste site.²⁶ Been

used census tracts rather than zip codes for a number of reasons.²⁷ Census tracts tend to change boundaries less than zip codes, are drawn up by local committees and are therefore more likely to reflect actual neighborhoods, are roughly equal in size, and better reflect the area immediately around a waste site.²⁸

Unlike the SADRI study, Been's study cross-referenced the following three lists of hazardous waste sites: (1) The 1994 Environmental Services Directory; (2) the 1992 Environmental Services Directory; and (3) the federal Environmental Protection Agency's (EPA's) database, the Resource Conservation and Recovery Information System.²⁹ The SADRI study used only the 1992 Environmental Services Directory.³⁰ In addition to adding a number of facilities which had been omitted in the earlier studies, Been also eliminated a number of facilities which were closed, closing, or which no longer accepted hazardous waste; the study included only sites currently accepting waste.³¹

Generally, Been's study found no statistically significant difference between the mean percentage of African-Americans in host and non-host communities, and a small, statistically significant difference between the mean percentages of Hispanics.³² Yet, Been did determine that some tracts bore a dispropor-

note 5, at iv. The sites and their respective proportions of African American residents are the following: 1) Chemical Waste Management, Sumter County, Alabama, 90 percent; 2) Industrial Chemical Company, Chester County, South Carolina, 38 percent; 3) SCA Services, Sumter County, South Carolina, 52 percent; and 4) Warren County PCB Landfill, North Carolina, 66 percent. *See id.* at ii, iv. Percentages are often higher when areas with borders within four miles of a site are considered. *See id.* at 1, 3, 5, 7

18. *See* Douglas L. Anderton et al., *Environmental Equity: Evaluating TSD Siting over the Past Two Decades*, WASTE AGE, July 1994, at 83 [hereinafter Anderton, *Evaluating TSD Siting*]; Douglas L. Anderton, et al., *Hazardous Waste Facilities: "Environmental Equity" Issues in Metropolitan Areas*, EVALUATION REV. 123, 123 (Apr. 1994) [hereinafter Anderton, *Issues in Metropolitan Areas*].

19. *See* Anderton, *Evaluating TSD Siting*, *supra* note 18, at 84.

20. *See id.*

21. Anderton, *Issues in Metropolitan Areas*, *supra* note

18, at 123

22. *See* Anderton, *Evaluating TSD Siting*, *supra* note 18, at 83

23. CHURCH OF CHRIST STUDY, *supra* note 5, at 5

24. *See generally* Wigley & Shrader-Frechette, *supra* note 7; Been, *supra* note 7; Paul Mohai, *The Demographics of Dumping Revisited: Examining the Impact of Alternate Methodologies in Environmental Justice*, 14 VA. ENVTL. L.J. 615 (1995).

25. Been, *supra* note 7, at 4

26. *See id.* at 5-6, 21

27. *Id.* at 4-5

28. *See id.*, cf. Mohai, *supra* note 24.

29. Been, *supra* note 7, at 9-11.

30. *See generally* Mohai, *supra* note 24.

31. Been, *supra* note 7, at 9-11. Been's study looked at 608 facilities, as opposed to SADRI's 520. *Id.* at 9, 11.

32. *Id.* at 5

tionate burden of hazardous waste sites—those with median family incomes between \$10,001 and \$40,000, those with African-American populations between 10 percent and 70 percent, those with Hispanic populations greater than 20 percent, and those with lower educational attainment levels.³³ Thus, while income and education were predictors of hazardous waste siting, race remained an important indicator.

In terms of raw numbers, if the distribution of facilities followed the distribution of the population, there would be twenty-four *more* facilities sited in the neighborhoods with no or very few African-Americans. In neighborhoods where African-Americans made up more than 10 percent but less than 70 percent of the population, there would be thirty-four *fewer* facilities. Neighborhoods with African-American populations of more than 70 percent would have ten more facilities.³⁴

Other professors also note that “minorities, disadvantaged in terms of education, income and occupation bear a disproportionate environmental risk. Socio-economically deprived groups are more likely than affluent whites to live near polluting facilities, eat contaminated fish and be employed at risky occupations.”³⁵ Political and economic resources are inextricably intertwined with environmental activism and the ability to get results. “Those who complain, who have greater access, who know how to tweak their Congress-people to do something, are more likely to get the attention of very busy people. And the people with greater know-how are generally those with greater political and economic resources, who tend to be white.”³⁶ In addition, African-

Americans and other minorities appear to be underrepresented among the memberships and staffs of major environmental organizations.³⁷

Professor Paul Mohai agrees that race affects hazardous waste siting but chose to focus upon a different set of statistics and factors.³⁸ First, he examined the control groups in the Church of Christ and SADRI studies.³⁹ The Church of Christ study measured *all* zip codes with sites against those without.⁴⁰ The SADRI study, however, analyzed *only* those census tracts within Standard Metropolitan Statistical Areas (SMSAs) *with* hazardous waste sites.⁴¹ Therefore, the SADRI study eliminated all tracts outside [SMSAs] regardless of whether or not these tracts contained a hazardous waste facility.⁴² As a result, the SADRI study excluded 32 percent of census tracts.⁴³ Mohai observed that due to the Church of Christ study’s use of zip codes, the Church of Christ control group (comprised of those living outside tracts with hazardous waste sites) had a lower percentage of people of color (12 percent) than the SADRI control group (23 percent), making a significant difference in the studies’ findings of affected races.⁴⁴

Second, Mohai noted that the Church of Christ and SADRI studies posed different questions.⁴⁵ The Church of Christ study asked how host zip codes compared racially to non-host zip codes.⁴⁶ The SADRI study wanted only to know how census tracts *within* host SMSAs compared in terms of racial makeup.⁴⁷ The authors of the SADRI study used only census tracts within SMSAs because the authors believed that rural areas and cities without hazardous waste should be excluded.⁴⁸ The

33. *Id.* at 21.

34. *Id.* at 18 (emphasis added).

35. Wigley & Shrader-Frechette, *supra* note 7, at 55-56 (citations omitted).

36. Lavelle & Coyle, *Special Investigation*, *supra* note 2, at S2.

37. See BULLARD, *supra* note 2, at 96.

38. Mohai, *supra* note 24, at 617.

39. See *id.* at 620.

40. See *id.*

41. See Douglas L. Anderton et al., *Environmental Equity: The Demographics of Dumping*, 31 DEMOGRAPHY 229, 232-33 (1994).

42. See Mohai, *supra* note 24, at 620.

43. See *id.*

44. *Id.* at 622.

45. *Id.* at 627.

46. See *id.*

47. See *id.*

48. See *id.* at 624.

underlying reason was to "exclude national parks, rural areas without any transportation facilities, [and] cities without an industrial economy that would require [a site]."⁴⁹ This effectively excluded a large number of tracts from the study. Mohai noted that such assertions are "purely conjectural," often having little relevance in analyzing the communities most affected by hazardous waste sites.⁵⁰ In fact, rural areas host many of the nation's largest hazardous waste sites.⁵¹

Finally, Mohai criticized SADRI's use of census tracts.⁵² By using census tracts to measure populations affected by hazardous waste sites, SADRI failed to examine populations within a 2.5 mile radius of hazardous waste sites.⁵³ The use of tracts which are often small, especially in densely populated urban areas, underestimates the extent to which those living in neighboring tracts (often bordering the waste sites) may be affected.⁵⁴ The approach risks overlooking many of those affected living outside the selected tracts.⁵⁵

In evaluating the impact of hazardous waste sites, Mohai examined areas within a 2.5 mile radius of a waste site: "[D]ifferences in the proportion of African-Americans and Hispanics within these areas and areas farther away become very apparent. [T]he contrast is 35 percent versus 21 percent [using census tracts]."⁵⁶ The difference is even greater within the twenty-five largest SMSAs. The proportion of African-Americans within 2.5 miles of the host tracts is 42 percent, as compared to 24 percent farther away.⁵⁷ As Mohai noted, "if zip codes areas represent geographic areas which may be too big, census tracts may represent

geographic areas that are too small."⁵⁸ By using census tracts or zip codes rather than areas within a 2.5 miles radius, many of those affected by hazardous waste siting are ignored.

A National Law Journal study similarly concluded that environmental racism continues to be a factor in hazardous waste siting.⁵⁹ The study made several findings based on computer-assisted analysis of census data, the EPA's civil court case docket, and the EPA's record of performance at 1,177 Superfund toxic waste sites.⁶⁰ First, environmental racism affects the rate at which sites are identified as hazardous waste sites and cleaned up.⁶¹ Second, assessed penalties for hazardous waste violations at sites having the greatest white population were approximately 500 percent higher than penalties at sites with the greatest minority population.⁶² For federal environmental laws aimed at protecting citizens from air, water and waste pollution, penalties in white communities were 46 percent greater than those in minority communities.⁶³ Third, under Superfund, abandoned hazardous waste sites in minority areas took 20 percent longer to be placed on the national priority action list than those in white areas.⁶⁴ Fourth, in more than half of the ten autonomous regions that administer the country's EPA programs, clean-up at Superfund sites began 12 percent to 42 percent later at minority sites.⁶⁵ Finally, under current law, permanent "treatment" of hazardous waste, the elimination of waste or its toxins, is preferred over "containment," the capping or walling off of a hazardous dump site.⁶⁶ At minority sites, containment occurred 7 percent more frequently than treatment.⁶⁷ At

49. *Id.* at 624-25.

50. *Id.*

51. See, e.g., BULLARD, *supra* note 2, at 61, 65, 70-73.

52. Mohai, *supra* note 24, at 630; cf. Been, *supra* note 7. Professor Been believed that using census tracts focused on those most directly affected by the waste site. *Id.* at 4-5.

53. See *id.* at 628.

54. See *id.* at 631.

55. See *id.* at 630.

56. *Id.* at 633.

57. See *id.*

58. *Id.* at 634

59. See Lavelle & Coyle, *Special Investigation, supra* note 2, at S2

60. See *id.*

61. See *id.*

62. See *id.*

63. See *id.*

64. See *id.*

65. See *id.*

66. See *id.*

67. See *id.*

the white sites, treatment occurred 22 percent more frequently than containment.⁶⁸

Lack of media attention given to environmental problems occurring in minority communities also hurts minorities.⁶⁹ As Professor Lazarus of St. Louis' Washington University's School of Law notes, "[t]he fact is that all environmental statutes pick winners and losers

They pick between problems because there aren't enough resources to deal with all the problems In the environmental game

minority communities have been the biggest losers."⁷⁰

Professor Mohai believes that the disparity in treatment stems from the classic effects of racism.⁷¹ First, minorities remain underrepresented in government and on the boards of polluting companies.⁷² Also, housing discrimination keeps minorities from leaving their segregated communities.⁷³ In addition, minorities, even as their levels of income and education rise, continue to live in segregated enclaves.⁷⁴

Moreover, the rate at which hazardous waste sites are cleaned up further demonstrates the disparity between minority and non-minority communities.⁷⁵ Two southwestern communities, a white, blue-collar mobile home park in Globe, Arizona and an African-American, middle-class neighborhood in Texarkana, Texas, discovered that their homes were located on land which had become contaminated by industrial waste twenty years earlier.⁷⁶ In Globe, residents of the 130 homes in the Mountain View Mobile Home park waged an intense legal and political battle, involving

federal, state and private entities, after their 1979 discovery that the community was grounded in the most dangerous form of asbestos.⁷⁷ After two years, the residents won \$80,000 each, which enabled them to move from their contaminated homes.⁷⁸ In Texarkana, residents of Carver Terrace, a neighborhood of seventy-nine one-story homes and a church, noticed the following problems soon after they moved there in 1968: When it rained, chemicals bubbled up to the surface; stench from the chemical bubbles filled the air; residents developed rashes and nose bleeds; and pets died.⁷⁹ Throughout the 1970s, residents sought answers and aid from federal health and environmental officials, but to no avail.⁸⁰ After years of effort, they succeeded in having the site placed on the Superfund list in 1986.⁸¹ In 1990, twenty-two years after initial discovery of the chemicals, funds for a buyout of their homes were inserted into the federal budget.⁸² Residents received an average of \$30,000 to \$40,000 for their homes.⁸³ The small payments forced many residents to relocate in ghettos and high-crime neighborhoods.⁸⁴

The small, all-African-American town of Triana, Alabama, faced a similar struggle.⁸⁵ The pesticide DDT had been produced at the nearby Redstone Arsenal Army Missile Base from 1947 to 1971.⁸⁶ Testing of town residents revealed contamination by DDT and the highly toxic chemical PCB (polychlorinated biphenyl).⁸⁷ Some residents manifested the highest-ever recorded levels of DDT contamination.⁸⁸ The federal government had known for

68. See *id.*

69. See BULLARD, *supra* note 2, at 19.

70. Lavelle & Coyle, *Special Investigation*, *supra* note 2, at S2.

71. See *id.*

72. See *id.*

73. See *id.*

74. See *id.*

75. See BULLARD, *supra* note 2, at 19-21. See generally Marianne Lavelle and Marcia Coyle, *Unequal Protection, the Racial Divide in Environmental Law, a Special Investigation, Bottom Line: Tale of Two Cities*, NAT'L L.J., Sept. 21, 1992, at S10 [hereinafter Lavelle & Coyle, *Tale of Two Cities*].

76. Lavelle & Coyle, *Tale of Two Cities*, *supra* note 75,

at S10.

77. See *id.*

78. See *id.*

79. See *id.*

80. See *id.*

81. See *id.*

82. See *id.*

83. See *id.*

84. See *id.*

85. See BULLARD, *supra* note 2, at 19-20.

86. See *id.*

87. See *id.*

88. See *id.*

many years that fish, which many residents ate daily from the nearby Indian Creek, contained one hundred times the safe DDT levels.⁸⁹ The government learned of the residents' high contamination levels in 1979.⁹⁰ The government's failure to respond however, ultimately forced Triana's mayor to institute a class action suit.⁹¹

Under Superfund, the sites with the most minorities take an average of 5.6 years from the date a toxic dump is discovered to be placed on a Superfund list, 20 percent longer than the 4.7 years it takes for sites with the highest white population.⁹² Once a site is placed on a list, however, it takes 10.4 years at a minority site to begin a comprehensive clean-up, which is only 4 percent longer than the 9.9 years it takes at white sites.⁹³ Sociology Professor John D. Bullard of Texas Southern University noted: "There are numerous cases of poor, [African-American], and powerless communities that are victimized and ignored when it comes to enforcing environmental quality standards equitably."⁹⁴

As noted above, race continues to play a large role in hazardous waste facility siting and in how quickly and comprehensively toxic contamination is addressed. While income and home value are important indicators in the placement of hazardous waste projects, race remains a predominant factor. As a result, minorities are disproportionately affected by hazardous waste facilities. Consequently, environmental racism remains an issue which the environmental community needs to address.

III. American Indians and Environmental Justice

American Indians are rarely treated as a separate group for the purposes of examining environmental racism.⁹⁵ Professor Mohai notes that SADRI fails to include Asians and American Indians in its finding.⁹⁶ Mohai observed, however, that it is nevertheless doubtful that this difference appreciably affects the outcomes. This is because people of color other than African-Americans and Hispanics account for only 2.3 percent of the total United States population, a number too small to significantly alter the respective findings of either the United Church of Christ or the SADRI study.⁹⁷

While it is undoubtedly true that including these two groups in the studies would have little effect on the overall findings, it ignores the fact that these statistics probably have a great deal of importance for those *within* these communities. As this Note will demonstrate, Indian tribes' experiences with hazardous waste projects often strikingly differ from that of other minority communities.

Like many minority communities, Indian reservations have been prime targets of the hazardous waste industry.⁹⁸ Almost all reservations have been contacted by at least one hazardous waste management company.⁹⁹ In San Diego County, which has more Indian reservations than any other area of the country, three "serious" hazardous waste projects were under

89. *See id.*

90. *See id.*

91. *See id.*

92. *See* Lavelle & Coyle, *Special Investigation*, *supra* note 2, at S2. The National Law Journal study did not define "minority community."

93. *See id.* There is a large disparity among the ten EPA regions. In six, clean-up at white sites is from 8 percent to 42 percent faster than at minority sites. *See id.* In Mid-Atlantic Region 3, the pace is even. *See id.* In three, the pace is *faster* for minority sites: 1) in the Deep South, Region 4, by 8 percent; 2) in New York/New Jersey, Region 2, by 11 percent; and 3) in the Pacific Northwest, Region 10, by 36 percent. *See id.*

94. BULLARD, *supra* note 2, at 21.

95. *Cf.* GAO STUDY, *supra* note 17, at 7 (noting that the Warren County PCB landfill is within four miles of Judkins Township, which is 47 percent American Indian). *See generally* CHURCH OF CHRIST STUDY, *supra* note 5; Mohai, *supra* note 24; Anderton, *Evaluating TSDS Siting*, *supra* note 18.

96. Mohai, *supra* note 24, at 623.

97. *Id.*

98. *See, e.g.* Dan McGovern, *The Battle over the Environmental Impact Statement in the Campo Indian Landfill War*, 3 HASTINGS WEST-NORTHWEST J. ENVTL. L. & POL'Y 145, 147 (1995); Palma Rempole, Comment, *One Tribes Development of a Commercial Waste Facility in the Wake of Environmental Racism*, 1 GREATER N. CENT. NAT. RESOURCES J. 209, 213-15 (1996).

99. *See* McGovern, *supra* note 98, at 147.

consideration in 1993.¹⁰⁰ Companies often look for the poorest, least-educated and least-politically organized communities in which to site their projects.¹⁰¹ Most of those chosen are minority communities, many being Indian reservations.¹⁰²

Unlike most minority communities, however, Indian tribes possess a great deal of sovereignty over their affairs.¹⁰³ "Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe."¹⁰⁴ A state court, therefore, may not order relief against a tribe in determining restrictions on their fishing rights, although it may adjudicate the rights of the individual members of a tribe over whom it has gained personal jurisdiction.¹⁰⁵ Similarly, a state court may not apply a state income tax, or any other law, to tribal Indians on a tribal reservation unless Congress has expressly provided that state law shall apply.¹⁰⁶

As one author noted, "[t]ribes have a strong interest in self-regulation and self-government that flows from the tribal sovereignty doctrine."¹⁰⁷ However, "the trend has been away from the idea of inherent Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power."¹⁰⁸ Federal laws, therefore, must

preempt states from gaining control over Indian tribes. "While under some circumstances a state may exercise concurrent jurisdiction over non-Indians acting on tribal reservations, such authority may be asserted only if not preempted by the operation of federal law."¹⁰⁹

Many federal environmental statutes do, however, grant Indian tribes a great deal of sovereignty and in so doing preempt states from applying their laws to Indian tribes.¹¹⁰ Subchapter 1 of the United States Nuclear Waste Policy Act provides for equal participation of both tribes and states when a facility is to be located on tribal or state land, effectively treating a tribe as a state and thereby recognizing its sovereignty.¹¹¹ The governing body of an Indian tribe is afforded the same notice as the governor and legislature of a state when a facility is proposed for the reservation.¹¹² A local community is guaranteed no such notice.¹¹³ Tribes, like states, may notify Congress of their disapproval of a decision to site a nuclear waste facility on tribal land.¹¹⁴ Tribes with an approved candidate repository site are provided with federal funding to review, evaluate, test and monitor activities undertaken under the chapter to evaluate the site's effects, and to develop a request for impact assistance.¹¹⁵ Additionally, "the Indian tribe on whose reser-

100. *See id.*

101. *See id.*

102. *See id.*

103. *See, e.g.,* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333 (1983); Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165, 173 (1977); McClanahan v. State Tax Comm'n, 411 U.S. 164, 171 (1973); *cf.* Rice v. Rehner, 463 U.S. 713, 723 (1983) ("[I]n Indian matters the States have also been permitted, and even required, to impose regulations related to liquor transactions."); FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 121 (1942).

104. *Puyallup Tribe*, 433 U.S. at 173.

105. *See id.*

106. *See McClanahan*, 411 U.S. at 170-71.

107. Roger Romulus Martella, Jr., "Not in My State's Indian Reservation"—A Legislative Fix to Close an Environmental Loophole, 47 VAND. L. REV. 1863, 1885 (1994).

108. *McClanahan*, 411 U.S. at 172.

109. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333 (1983).

110. *See, e.g.,* Yankton Sioux Tribe v. Southern Mo. Waste Mgmt. Dist., 99 F.3d 1439, 1442 (8th Cir. 1996); Blue Legs v. Bureau of Indian Affairs, 867 F.2d 1094, 1096-97 (8th Cir. 1989), *enforced by* Blue Legs v. EPA, 732 F. Supp. 81 (D.S.D. 1990); 42 U.S.C. §§ 10101, 10121, 10132, 10138 (West 1997). But *see* Eleanor N. Metzger, *Driving the Environmental Justice Movement Forward: The Need for a Paternalistic Approach*, 45 CASE W. RES. L. REV. 379, 396 (1994) ("In the environmental justice arena, justifications for paternalistic legislation vindicate a paternalistic approach. . . . when there is a small intrusion which protects against a small risk.").

111. *Cf.* 42 U.S.C. § 10132 (West 1997) (explaining that tribes, unlike "interested governors," are not invited to consult with the Secretary of the Interior to "issue general guidelines for the recommendation of sites for [nuclear waste] repositories"). *See, e.g.,* 42 U.S.C. §§ 10121, 10136 (West 1997).

112. *See* 42 U.S.C. § 10136 (West 1997).

113. *See* 42 U.S.C. §§ 10121, 10165 (West 1997).

114. *See* 42 U.S.C. §§ 10136, 10138 (West 1997).

115. *See* 42 U.S.C. § 10138 (West 1997).

vation the site is located, or, *in the case that the site is not located on a reservation*, the State in which the site is located, shall be eligible to enter a benefits agreement with the Secretary under section 10173 of this title.¹¹⁶

Courts recognize that Indian tribes have some control over the siting of hazardous waste facilities; however, tribes are still subject to environmental regulations.¹¹⁷ The Ninth Circuit noted that because of tribal sovereignty, "RCRA [the Resource Conservation and Recovery Act] does not authorize the *states* to regulate Indians on Indian lands."¹¹⁸ Tribal sovereignty, however, may be preempted by federal statutes, thereby giving tribes the responsibility of enforcing environmental statutes such as RCRA.¹¹⁹

In *Blue Legs v. EPA*, the Oglala Sioux tribe operated twelve solid waste disposal facilities, all but one located on lands of the tribe and/or of individual tribal members and held in trust for the tribe by the federal government.¹²⁰ The court noted that the tribe had sovereignty over its lands and that "tribes still possess their inherent sovereignty, except where it has been specifically taken from them either by treaty or by Congressional act."¹²¹ Although holding that RCRA was an explicit preemption upon the sovereignty of the Oglala Sioux Tribe,¹²² the court noted that RCRA fails to address how tribes should implement hazardous waste sites on

reservations.¹²³

The battle over the hazardous waste facility on the Campo Indian Reservation emphasizes the fact that while tribes are still subject to environmental laws, often having less flexibility than states, they still retain an inherent sovereignty which gives them greater power to manage hazardous waste projects.¹²⁴ Approximately 300 tribal members live on the Campo reservation, located about seventy miles east of San Diego.¹²⁵ In 1987, when the Campos began consideration of a landfill, the tribe's unemployment rate had reached 79 percent.¹²⁶ In 1990, Mid-American Waste Systems, Inc. (MAW) proposed a 600-acre landfill in the southeast corner of the Campo reservation.¹²⁷ The district court noted that the purpose of the project was to provide economic opportunities for the members of the tribe.¹²⁸ The Campos, like many other Indian tribes with sites on their reservations, would own a share of the proposed project.¹²⁹ The district court twice held that the project could go forward.¹³⁰ Thus, EPA approved the project.¹³¹ The District of Columbia Court of Appeals, however, vacated EPA's approval.¹³²

Under RCRA, Indian tribes, though they possess inherent sovereignty, continue to be treated as municipalities, not states.¹³³ Therefore, Indian tribes are not given the flexi-

116. 42 U.S.C. § 10167 (West 1997) (emphasis added). Most statutes treat states and Indian reservations equally as potential sites for hazardous waste facilities. Compare 42 U.S.C. §§ 10121, 10136, 10137, 10169, 10173 (West 1997) with 42 U.S.C. §§ 10166, 10167 (West 1997). Section 10167's language seems to assume that Indian reservations will constitute the majority of sites chosen; the financial incentives, which are limited to \$3 million, would likely be more attractive to a small, impoverished Indian tribe than a state. See 42 U.S.C. § 10199 (West 1997).

117. See *Blue Legs v. EPA*, 668 F.Supp. 1329, 1339 (D.S.D. 1987); *Washington Dep't of Ecology v. EPA*, 752 F.2d 1465, 1469 (9th Cir. 1985).

118. *Washington Dep't of Ecology*, 752 F.2d at 1467-68 (emphasis added).

119. See *Blue Legs*, 668 F.Supp. at 1341.

120. *Id.* at 1331.

121. *Id.* at 1338.

122. See *id.* at 1341.

123. See *Washington Dep't of Ecology*, 752 F.2d at 1469.

124. See *Backcountry Against Dumps v. EPA*, 100 F.3d 147, 151 (D.C. Cir. 1996) (appealing EPA approval of hazardous waste project), *San Diego v. Babbitt*, 847 F.Supp. 768, 774 (S.D. Cal. 1994), *San Diego v. Babbitt*, No. 93-0986-IEG, 1993 WL 476414, at *3 (S.D. Cal. Oct. 25, 1993) (denying a preliminary injunction).

125. See McGovern, *supra* note 98, at 145.

126. See *id.*

127. See *Backcountry Against Dumps*, 100 F.3d at 149.

128. See *Babbitt*, 1993 WL 476414, at *5. Almost every tribe in the country has been contacted by at least one hazardous waste company. See McGovern, *supra* note 98, at 145.

129. See McGovern, *supra* note 98, at 147.

130. See *San Diego v. Babbitt*, 847 F.Supp. 768, 777 (S.D. Cal. 1994), *Babbitt*, 1993 WL 476414, at *1.

131. See *Backcountry Against Dumps*, 100 F.3d at 148.

132. See *id.*

133. See *id.*

bility which states are given in submitting hazardous waste site plans to EPA.¹³⁴ "States determined to have developed adequate programs are labeled 'approved states.' [W]hile the baseline criteria are the same for approved and unapproved states, approved states may use different means to reach those ends."¹³⁵ Because the statute defines Indian tribes as municipalities rather than as states, and because only states may submit solid waste management plans for EPA approval, EPA does not possess the authority to approve the Campo tribe's plans.¹³⁶ Rather, the Campo tribe must follow the design standards which EPA has promulgated.¹³⁷ The Campo tribe *may, however*, seek EPA approval for a site-specific regulation, thereby satisfying both the tribe's desire for flexibility and RCRA.¹³⁸

More pertinent than the court's determination of tribal authority is the Campo tribe's ability to play a role in the decision-making process concerning the hazardous waste project.¹³⁹ The Campo tribe sought economic development on the reservation for years but with little success.¹⁴⁰ In 1987, the tribe began investigating the possibility of siting a hazardous waste facility on the reservation.¹⁴¹ Consequently, the tribe learned that San Diego County's lack of landfill space and the reservation's remote location made the reservation an excellent site for a solid waste landfill.¹⁴²

The tribe's legislative and proprietary pow-

ers are all vested in the General Council of the tribe, which consists of all adult members of the tribe.¹⁴³ The tribe voted dozens of times on various aspects of the project.¹⁴⁴ On every occasion, the project had overwhelming support.¹⁴⁵ To establish a governing body to govern the site, the tribe created the Campo Environmental Protection Agency (CEPA).¹⁴⁶ CEPA is completely responsible for enforcing the environmental laws which the General Council of the Tribe enacts.¹⁴⁷ Tribes can, like the Campo, insist on preferential hiring and divide proceeds from the sites among tribal members.¹⁴⁸ The Council also created a corporation, Muht-Hei, Inc., to manage the tribe's business, and enacted the Campo Solid Waste Management Code.¹⁴⁹ The Code authorizes CEPA to develop regulations for the management of hazardous waste sites and for any needed clean-ups.¹⁵⁰ Notably, consultants paid for by MAW drafted both the Code and CEPA.¹⁵¹ CEPA also made possible the opportunity for the tribe to address other environmental concerns.¹⁵²

The Campo tribe strictly regulated the proposed project.¹⁵³ The landfill containment system proposed in the Environmental Impact Statement (EIS), consisting of recundant primary and secondary liners to isolate the waste from the groundwater supply, well exceeded both state and federal environmental regulations.¹⁵⁴ CEPA maintains stricter safety require-

134. See *id.* at 151.

135. *Id.* at 148-49.

136. See *id.* at 151.

137. See *id.* at 148-49.

138. See *id.* at 151.

139. See generally *San Diego v. Babbitt*, 847 F.Supp. 768 (S.D. Cal. 1994); *San Diego v. Babbitt*, No. 93-0986-IEG, 1993 WL 476414 (S.D. Cal. Oct. 25, 1993); McGovern, *supra* note 98; Jana L. Walker & Kevin Gover, *Commercial Solid and Hazardous Waste Disposal Projects on Indian Lands*, 10 YALE J. ON REG. 229 (1993); Rempole, *supra* note 98.

140. See Walker & Gover, *supra* note 139, at 251.

141. See *id.*

142. See *id.* at 251-52. The landfill would not handle any hazardous waste. See *id.* at 253.

143. See *id.* at 253.

144. See *id.*

145. See *id.*

146. See McGovern, *supra* note 98, at 145.

147. See Walker & Gover, *supra* note 139, at 254.

148. See McGovern, *supra* note 98, at 147.

149. See Walker & Gover, *supra* note 139, at 253-54.

150. See *id.* at 254.

151. See *id.* at 252.

152. See Rempole, *supra* note 98, at 229.

153. See McGovern, *supra* note 98, at 153-57.

154. See *San Diego v. Babbitt*, 847 F. Supp. 768, 774 (S.D. Cal. 1994); McGovern, *supra* note 98, at 153-57 (discussing the proposed site's comprehensive plan to control hazardous waste leachate). As reservation land is held in trust by the federal government, the National Environmental Protection Act was implicated and an

ments than required by the federal government.¹⁵⁵ Consequently, the containment system's risk of failure within 150 years is 3 percent, as compared to 30 percent for a landfill which satisfies federal design criteria.¹⁵⁶ CEPA also requires the landfill operator to operate a groundwater monitoring system which accords with both federal and tribal regulations.¹⁵⁷ In addition, the EIS compiled by the tribe lists remediation measures which could be implemented if the liner system leaked.¹⁵⁸ As Secretary James M. Strock of the California EPA noted, the regulations appear "as protective, and in some cases more so than California's."¹⁵⁹ In addition, the Department of Interior promulgated strict guidelines for projects on Indian reservations, including a strict regulatory system and a requirement of notice of risks and of financial terms.¹⁶⁰

Many authors have noted the contradictions inherent in waste siting on Indian reservations.¹⁶¹ Hazardous waste sites generally seem forced upon communities which are unwilling to host them. Yet, Indian tribes willingly allow these sites to be placed on their land, and indeed seek them out.¹⁶² Professor Nancy B. Collins of the University of Richmond School of Law believes that the use of tribal lands as sites for the federal government's nuclear waste is another example of "[t]he exchange of Indian land for the federal government's money or promises [which] has defined tribal-U.S. relations since the founding of this nation."¹⁶³ She notes that while nuclear waste can provide a

tribe with future economic strength, jobs and money for health care, it can also destroy tribal lands.¹⁶⁴

Nonetheless, hosting dangerous activities on tribal land produces the much needed benefit of increased tribal income.¹⁶⁵ Laguna Pueblo in New Mexico provides an example of how money procured by hosting dangerous activities can benefit a tribe.¹⁶⁶ As host to a uranium mine, Laguna Pueblo has become one of the best-educated tribes, having produced poets, doctors, writers, lawyers and academics.¹⁶⁷

Such benefits, however, come at the price of sovereignty. Under the 1982 Nuclear Waste Policy Act, the federal government controls the nuclear waste dumped on Indian land.¹⁶⁸ The Act requires both states and Indian tribes to apply for grants from the federal government for Monitored Retrievable Storage Facilities where spent nuclear and high-level waste is packaged, handled and temporarily stored before disposal in deep geological depositories.¹⁶⁹ Despite the loss of sovereignty which the Act mandates, sixteen of the twenty applicants for Phase I of the grants were Indian tribes, as were all of the Phase II applicants.¹⁷⁰

Another author, Eleanor N. Metzger, however, suggested that minority communities are unable to protect themselves from environmental racism.¹⁷¹ Consequently, remedying the injustice done to minority communities mandates a paternalistic approach by the federal government.¹⁷² Metzger believes that because minority communities lack education and

Environmental Impact Statement (EIS) was necessary. See *id.* at 148-49.

155. See Walker & Gover, *supra* note 139, at 257.

156. See Babbitt, 847 F. Supp. at 774.

157. See *id.*

158. See *id.*

159. McGovern, *supra* note 98, at 145.

160. See *San Diego v. Babbitt*, No. 93-0986-IEG, 1993 WL 476414, at *6 (S.D. Cal. Oct. 25, 1993).

161. See, e.g., Nancy B. Collins & Andrea Hall, *Nuclear Waste in Indian Country: A Paradoxical Trade*, 12 *LAW & INEQ.* J. 267, 270 (1994) (focusing solely on nuclear waste); Martella, *supra* note 107, at 1868; Robert Sitkowski, *Commercial Hazardous Waste Projects in Indian Country: An Opportunity for Tribal Economic Development Through Land Use*

Planning, 10 *LAND USE & ENVT. L.* 239, 244 (1995).

162. See Collins & Hall, *supra* note 161, at 270; Martella, *supra* note 107, at 1868; Sitkowski, *supra* note 161, at 244.

163. Collins & Hall, *supra* note 161, at 270.

164. See *id.* at 274.

165. See *id.* at 297.

166. See *id.*

167. See *id.*

168. See *id.* at 270.

169. See *id.* at 287.

170. See *id.* at 299-300.

171. Metzger, *supra* note 110, at 379.

172. See *id.*

resources and because the immediacy of environmental problems precludes any effective education, any non-paternalistic approach will fail.¹⁷³ However, Jana L. Walker and Kevin Gover, who represented the Campo tribe, noted that "[u]nder certain circumstances, a solid or hazardous waste disposal project is a viable and appropriate form of industrial development for some Indian tribes."¹⁷⁴

IV. Chester, Pennsylvania: An Example of Environmental Racism?

The extent to which Chester, Pennsylvania, a small city near Philadelphia, has been affected by hazardous waste sites is well-documented.¹⁷⁵ African-Americans constitute 65 percent of Chester's 42,000 residents; one quarter live below the poverty line.¹⁷⁶ Chester possesses public housing ranked among the nation's worst, and high rates of truancy, crime, teenage pregnancy and infant mortality.¹⁷⁷ Homelessness, AIDS and drug abuse also add to the city's problems. Its schools adduce the highest absentee teacher rate and the lowest standardized scores in the state.¹⁷⁸ Chester once garnered a reputation as a major industrial center.¹⁷⁹ A landmark sign near the Chester train station reads "[w]hat Chester makes, makes Chester."¹⁸⁰ Now, however, the only industry

associated with Chester is the hazardous waste industry.¹⁸¹ One resident noted: "Right now we are recruiting all of the garbage, the scum nobody wants. I ask you: What does that make Chester?"¹⁸²

In the early 1970s, a Chester resident, Melvin R. Wade, began leasing land to the ABM Disposal Company.¹⁸³ ABM brought hazardous waste to the property in tank cars and drums.¹⁸⁴ ABM then stored the hazardous waste either in the tank cars and drums or emptied it directly onto the soil.¹⁸⁵ At one point, more than 100,000 drums cluttered the property.¹⁸⁶ In February, 1978, one of the largest chemical waste fires in this country's history erupted on the property.¹⁸⁷ Firefighters and others who came into contact with the site fell ill.¹⁸⁸ A number of those exposed ultimately died of cancer.¹⁸⁹ Fifty hazardous substances were found in the soil when tested.¹⁹⁰ "[I]mmense destruction—including wildlife and soil contamination, and wildlife devastation—had already been inflicted on the environment."¹⁹¹

Today Chester, a city of 42,000 people, boasts no McDonald's, ACME drug store, Burger King, or public swimming pool.¹⁹² Yet by 1993, Chester housed five different waste facilities.¹⁹³ The different facilities include a large Westinghouse trash-to-steam plant (the

173. *Id.* at 394-96.

174. Walker & Gover, *supra* note 139, at 231-32.

175. See generally *Wade v. Dupont, Inc.*, No. CIV.A.94-3300, 1995 WL 717440 (E.D. Pa. Nov. 30, 1995); Akim F. Czmus, *The Failure of Environmental Regulation: What is a Poor Person To Do? Are the Civil Rights of Community Residents at Odds with Environmental Concerns?* Chester Residents Concerned for Quality Living v. Pennsylvania Dep't of Env'tl. Resources and Thermal Pure Sys., Inc., 16 HAMLINE J. PUB. L. & POL'Y 101; Hardy & Wood, *Treatment Questioned*, *supra* note 1, at A1; Susan O. Stranahan, *State Approves Infectious Waste Plant for Chester; the Plant is a Block from a Waste Incinerator. A Community Leader Charges "Environmental Racism"*, PHILA. INQUIRER, July 24, 1993, at B1.

176. See Hardy & Wood, *Treatment Questioned*, *supra* note 1, at A1; Michael DeCourcy Hinds, *Pennsylvania City Hopes It's Bounding Back from the Bottom*, N.Y. TIMES, Jan. 5, 1992, at 14.

177. See Hinds, *supra* note 176, at 14.

178. See *id.*

179. See Czmus, *supra* note 175, at 101.

180. Hardy & Wood, *Treatment Questioned*, *supra* note 1, at A1.

181. See *id.*

182. *Id.*

183. See *Wade v. Dupont, Inc.*, No. CIV.A.94-3300, 1995 WL 717440, at *1 (E.D. Pa. Nov. 30, 1995).

184. See *id.*

185. See *id.*

186. See *id.*

187. See *id.*

188. See *id.*

189. See *id.*

190. See *id.* at *2.

191. *Id.*

192. See Hardy & Wood, *Treatment Questioned*, *supra* note 1, at A1.

193. See Czmus, *supra* note 175 at 102.

fourth largest incinerator of solid waste in the world), the Delaware County Regional Water Control Authority sewage treatment plant, a hospital-waste sterilization operation, a rock-crushing plant, and an incinerator for oil-contaminated soil.¹⁹⁴ The trash-to-steam plant, which processes 985,000 tons of waste annually, creates an ominous, persistent rumble.¹⁹⁵ The sewage treatment plant, which treats waste from forty of forty-nine municipalities in the county, fills the air with a pungent odor.¹⁹⁶ Soil Remediations Systems plan to burn up to 1,200 tons of oil-tainted soil every day.¹⁹⁷ The hospital-waste sterilization facility expects to receive 300 tons of medical waste daily and to operate around the clock.¹⁹⁸ In addition to the noise and odors emanating from the plants, Chester residents also deal with increased traffic.¹⁹⁹ Hundreds of waste-bearing diesel trucks travel through well-populated areas daily.²⁰⁰ Black diesel exhaust follows in their wake along streets where children play.²⁰¹

Nevertheless, the City of Chester receives compensation for becoming the site of numerous hazardous waste facilities.²⁰² The Westinghouse plant contracted to pay \$2.50 a ton or at least \$2 million to the city treasury annually.²⁰³ In addition, about 38 percent of Westinghouse's workforce of 112 lives in Chester.²⁰⁴ The BioMedical plant promised to hire 75 percent of its workforce from Chester,

out of a potential workforce of 100.²⁰⁵ Just over 100 people work at the sewage treatment plant.²⁰⁶

Seeing no other alternative, residents of minority and economically crippled communities, presented with promises of money and jobs, unwillingly receive hazardous waste facilities.²⁰⁷ This dilemma may, in part, explain the situation in Chester. Chester certainly is in dire financial straits;²⁰⁸ one quarter of the population lives below the poverty line.²⁰⁹ Additionally, most of the city's industrial base has departed.²¹⁰ The city budget remains consistently in the red, and property taxes place among the highest in the country.²¹¹ "No one is lining up to build Marriotts and luxury condos in Chester these days, the argument goes. You take what you can get and make the best deal you can."²¹²

The community appears split, however, on whether to allow waste facilities in exchange for the benefits of jobs and money which they bring.²¹³ City Councilman Ed Zetuskey argues that Chester needs to lure these facilities precisely because Chester has nothing else going for it.²¹⁴ The city generates money through host fees and taxes.²¹⁵ By bringing jobs, the facilities can stimulate Chester's economy.²¹⁶ City Councilman Charles McLaughlin echoed Zetuskey, noting that "[t]he city will benefit financially from our agreement with Thermal

194. See Hardy & Wood, *Treatment Questioned*, *supra* note 1, at A1; Reverend Horace W. Strand, *Racism Can Be Hazardous to Your Health*, PHILA. INQUIRER, Sept. 19, 1993, at MD3.

195. See Stranahan, *supra* note 175, at B1.

196. See Hardy & Wood, *Treatment Questioned*, *supra* note 1, at A1.

197. See *id.*

198. See Stranahan, *supra* note 175, at B1.

199. See Hardy & Wood, *Treatment Questioned*, *supra* note 1, at A1.

200. See *id.*

201. See *id.*

202. See generally *id.*; Czmus, *supra* note 175; Stranahan, *supra* note 175.

203. See Hardy & Wood, *Treatment Questioned*, *supra* note 1, at A1.

204. See *id.*

205. See *id.*

206. See *id.*

207. See Nelson Perez, Note and Comment, *The Unconstitutionality of Waste Flow Control and the Environmental Justice Movement's Impact on Incinerators*, 22 RUTGERS COMPUTER & TECH L.J. 587, 606 (1996).

208. See Czmus, *supra* note 175, at 101.

209. See *id.*

210. See *id.*

211. See Hinds, *supra* note 176, at 14.

212. Hardy & Wood, *Treatment Questioned*, *supra* note 1, at A1.

213. See generally *id.*, Stranahan, *supra* note 175.

214. See Hardy & Wood, *Treatment Questioned*, *supra* note 1, at A1.

215. See *id.*

216. See *id.*

Pure [operator of the proposed hospital waste treatment plant]."²¹⁷

Others, however, maintain that such siting is merely another example of environmental racism.²¹⁸ The communities that host the facilities have the common characteristic of lacking the economic resources and political clout to oppose the siting decisions.²¹⁹ Alice Brown, assistant counsel for the NAACP Legal Defense Fund, called such siting decisions "environmental insults."²²⁰ She further commented that "[i]t doesn't make it any less odious, but it's not unique."²²¹

Chester, however, wanted the facilities – at least its City Council did.²²² Nonetheless, many residents opposed the siting decisions²²³ and wanted Westinghouse, owner of the waste-to-steam facility, to purchase their homes so they could move out of the neighborhood.²²⁴ Others complained that they go outside less often and that their children have to play in smoke and exhaust.²²⁵

The opposition consequently led residents to organize into groups, including the Chester/Delaware County Residents for the Environment and Chester Residents Concerned for Quality Living (CRCQL).²²⁶ Even the new mayor, Barbara Bohannon-Shepard, declared "[w]e're going to have town meetings, we're going to work as a team and we're going to step on a lot of toes to make changes around here."²²⁷ Yet, this change failed to create an opportunity for residents to weigh the pros and cons of another hazardous waste facility.²²⁸ As the Reverend Horace W. Strand, a

leader of CRCQL, noted in reference to the Westinghouse trash-to-steam plant. "The people of Chester never really understood what was taking place. No one intelligently explained the health risks or the immediate effects this facility would have on their lives."²²⁹

In 1993, CRCQL brought suit against Thermal Pure Systems, Inc., seeking review of the permit issued to Thermal Pure's commercial infectious waste treatment facility.²³⁰ The treatment plant is located on a fifty-two acre parcel which contains the Westinghouse Incinerator, the sewage treatment plant and a municipal waste transfer station.²³¹ While the incinerator and the transfer station accept 5,700 tons of waste daily, the new facility anticipates accepting up to 488 tons daily and processing waste twenty-four hours a day, seven days a week.²³² According to CRCQL's attorney, the permit would allow the plant to treat about twelve times the waste that would be available from the entire state.²³³ The city entered into the contract with Thermal Pure, by which it would receive \$5 per ton and 80 percent of all the jobs created, "primarily because of [its] high unemployment rate and poor economic condition."²³⁴ The Department of Environmental Resources (DER) did not hold hearings on the project, nor did DER consider the racial makeup of the site when making its decision.²³⁵

In reviewing the appeal made by CRCQL, the Pennsylvania Environmental Hearing Board noted that Chester residents are affected by the volume of truck traffic all day and night, by diesel fumes, by odors and dirt, and

217. Dan Hardy & Anthony R. Wood, *Waste Facility to Remain Open Despite Challenge*, PHILA. INQUIRER, Oct. 22, 1993, at MD1 [hereinafter Hardy & Wood, *Environmental Racism*].

218. See, e.g., Strand, *supra* note 194, at MD3.

219. See Hardy & Wood, *Treatment Questioned*, *supra* note 1, at A1.

220. See *id.*

221. *Id.*

222. See *id.*

223. See *id.*

224. See *id.*

225. See *id.*

226. See *id.*, Stranahan, *supra* note 175, at B1.

227. Hinds, *supra* note 176, at 14.

228. See Strand, *supra* note 194, at ME3.

229. *Id.*

230. See Chester Residents Concerned for Quality Living v. Pennsylvania Dep't of Env'tl. Resources, No. 93-234-MR, 1993 WL 456285, at *1 (Pa. Env'tl. Hr'g Bd. Oct. 20, 1993).

231. See *id.*

232. See *id.* at *2.

233. See Hardy & Wood, *Environmental Racism*, *supra* note 217, at MD1.

234. *Chester Residents Concerned for Quality Living*, 1993 WL at *2.

235. See *id.* at *3.

by health and safety concerns.²³⁶ The board denied review, however, holding that the facility would not cause residents any additional problems: "Obviously these conditions already exist, caused apparently by the Westinghouse incinerator and to a lesser extent, by the transfer station. [Thermal Pure's] facility will not add to them."²³⁷ The board also found it unnecessary to hold any public hearings.²³⁸ Because DER attended city council meetings where the plan had been discussed, "[i]t may have been concluded that a public hearing would not have accomplished anything more."²³⁹

CRCQL also claimed that Chester residents were victims of environmental racism.²⁴⁰ The board, however, noted that, except along the north side, the population around the sites was almost evenly split.²⁴¹ Also, waste sites throughout southeastern Pennsylvania were located predominately in mostly white neighborhoods.²⁴² Therefore, the board held that CRCQL failed to establish the invidious discriminatory intent necessary to support a claim of environmental racism.²⁴³ The board concluded that "[l]ife in organized society necessarily involves risks, burdens, and benefits. These all increase as the society grows larger and more complex. Ideally, they should be shared equally by all members of society, but that is rarely, if ever possible."²⁴⁴

Though the City of Chester agreed to host Thermal Pure's hospital waste sterilization plant, many residents opposed any additional hazardous waste facilities. The board's failure to ensure that open, public meetings were held on the facility and to consider the cumulative effects of a large number of hazardous waste facilities demonstrate a lack of concern for those, often minorities, who are affected by the

aggregation of incinerators and treatment plants. As Professor Bullard noted, "[t]he siting process has resulted in minority neighborhoods (regardless of class) carrying a greater burden of localized costs than either affluent or poor white neighborhoods."²⁴⁵ Judicial ignorance of these racially disparate siting decisions will not change the undue burdens which confront minorities.

V. A Suggestion for Increasing Environmental Equity

Due to their unique status, American Indian reservations can attract and procure hazardous waste facilities while retaining control over the facilities. Like the Campos, many tribes view these facilities as viable options by which to create jobs and to spur a weak economy. Often, many of the tribal members agree on and overwhelmingly support the siting decisions. Individual tribe members play significant roles in assuring that their concerns are addressed and that the facilities will benefit, rather than disadvantage, the community.

Other minority communities are not so favored. Residents of cities or neighborhoods often play little or no role in the siting of hazardous waste facilities. As in Chester, city councils often make the siting decisions, affording little opportunity for input from city residents. City government is ultimately accountable to its residents. In the meantime, a city may be given a hazardous waste facility which severely harms the environment of the community.

Minority communities will never have the sovereignty granted American Indians. To help ensure environmental equity, however, minori-

236. See *id.* The board claimed, without support, that "[n]early all of the major waste processing and disposal facilities in DER's southeastern region are located in areas where the population is primarily Caucasian." *Id.* The board also noted that the area surrounding the plant, where most of Chester's waste facilities are located is 50 percent to 70 percent African American. See *id.* Delaware County is 11 percent African American; Chester is 65 percent African American. See *id.*

237. *Id.* at *6 (footnote omitted).

238. See *id.* at *3.

239. *Id.* at *6

240. See *id.* at *7.

241. See *id.*

242. See *id.*

243. See *id.* (citations omitted)

244. *Id.*

245. BULLARD, *supra* note 2, at 38

ty communities must be given greater input into siting decisions. One way to afford these communities greater input would be to require hearings regarding hazardous waste projects proposed by federal, local and state governments. Another option, however, is a statutory requirement that any hazardous waste project be approved, by town, city or county vote, by the residents of the community which will be affected by the site. The affected communities could be determined by state or federal environmental protection agencies. Currently, such

votes are required for bond measures in many states and cities. Any such vote on a hazardous waste facility would certainly engender a great deal of debate, controversy and discussion.

Whatever a community decides, it should be given the opportunity to make its voice heard, either during discussion of the facility or at the ballot box. While a simple suggestion, it would give a voice to those who have been largely silenced in the debate over hazardous waste sites.